

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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:  
UNITED STATES OF AMERICA, :  
:  
v. : 18-CR-204 (NGG) (VMS)  
:  
KEITH RANIERE, et al., : September 27, 2018  
:  
Defendant. : Brooklyn, New York  
:  
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TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE  
BEFORE THE HONORABLE VERA M. SCANLON  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1           THE CLERK: Criminal cause for status  
2 conference, case number 18-CR-204, U.S. v. Keith  
3 Ranieri, Allison Mack, Clare Bronfman, Kathy Russell,  
4 Lauren Salzman, and Nancy Salzman.

5           Counsel, please state your appearances,  
6 starting with the government.

7           MS. PENZA: Moira Kim Penza and Tanya Hajjar  
8 for the United States. Good afternoon, your Honor.

9           THE COURT: Hello.  
10          Other counsel in the room?

11          MR. AGNIFILO: Mark Agnifilo, Paul  
12 DerOhannesian, and Teny Geragos for Mr. Ranieri, who is  
13 incarcerated, and we waive his appearance.

14          THE COURT: Okay.

15          MR. MCGOVERN: Bill McGovern and Sean  
16 Buckley for Allison Mack, who also has waived her  
17 appearance today.

18          THE COURT: Okay.

19          MR. SOLOWAY: Hello, your Honor. Robert  
20 Soloway appearing for Nancy Salzman, together with  
21 David Stern, who is on the phone. I'm joined at  
22 counsel table by our paralegal, Myrawin (ph) Ulerio, U-  
23 l-e-r-i-o.

24          THE COURT: And your client is here or  
25 waives her appearance? Your client is here or she

1 waives her appearance?

2 MR. SOLOWAY: My client waives her  
3 appearance, your Honor.

4 THE COURT: Okay.

5 MS. RAVICH: Amanda Ravich for Kathy  
6 Russell. My client waives her appearance.

7 THE COURT: Okay.

8 MS. NECHELES: Good afternoon, your Honor.  
9 Susan Necheles and Kate Cassidy for Ms. Bronfman, and  
10 she waives her appearance as well, your Honor.

11 THE COURT: Okay. So we have the  
12 government's letter from the 24<sup>th</sup>, the 25<sup>th</sup> with  
13 supplemental information, and the Necheles/Cassidy  
14 letter. Have you all had any additional opportunity to  
15 talk about -- did I skip the folks on the phone after  
16 all that effort?

17 THE CLERK: Yes.

18 THE COURT: On the phone, I think you were  
19 acknowledged but if you could state your appearance  
20 please?

21 MR. DIAZ: Yes, your Honor. Hector Diaz for  
22 Lauren Salzman, and we waive Ms. Salzman's appearance.

23 THE COURT: Sorry. Have you had any  
24 additional opportunity to talk about any of these  
25 issues? Then there was deafening silence. We have the

1 government's letter of the 24<sup>th</sup> with the most relevant,  
2 the proposed schedule, and the 25<sup>th</sup> with additional  
3 technical information as well as the updated schedule.  
4 This may be an obvious question but let me just make  
5 sure.

6           On the third page of your second letter, you  
7 say the government has endeavored to make available  
8 full discovery copies of all the electronic data in its  
9 possession to defendants and has done so with respect  
10 to a significant number of devices.

11           Does everybody have a copy of their own  
12 information at this point?

13           MS. PENZA: Yes, your Honor, that's right,  
14 almost. There are a few outstanding items from the  
15 search of Nancy Salzman's house, which have all been  
16 indicated on our spreadsheet. To the extent we have --  
17 to the extent there have been imaged copies, we expect  
18 those to be made available by next Friday, which we  
19 indicated in the spreadsheet.

20           THE COURT: Okay.

21           MS. PENZA: So those are in the process of  
22 getting from the FBI, where we will provide them to  
23 Doopcoop (ph) in full, and Nancy Salzman's attorneys  
24 will be able to get those.

25           THE COURT: So those are the couple of I

1 think Oregon Trail devices that are noted.

2 MS. PENZA: Yes. For example, 1B79.

3 THE COURT: Right, okay. Let me also ask  
4 you -- TBD. So it's there for 1B87, 86, 85, 81 --

5 MS. PENZA: So most -- I'm sorry.

6 THE COURT: Just so the record is complete  
7 -- 1B74, 1B71. I think those are the TBD's. What's up  
8 with those?

9 MS. PENZA: The vast majority of those I  
10 believe are the ones that have been sent to FBI  
11 headquarters. Those were sent in response to one of  
12 the questions that defense counsel asked regarding when  
13 those were sent to FBI headquarters. It's been on a  
14 rolling basis, understanding that there is this queue  
15 that we explained in our letter as to priorities and  
16 what they will attempt to unlock or otherwise access.  
17 Some of those items were sent all the way back in  
18 March. So that is what accounts for most of the TBD's.  
19 I believe there is --

20 THE COURT: The iPod?

21 MS. PENZA: -- one TBD that was an accident,  
22 which was --

23 THE COURT: So the iPod?

24 MS. PENZA: -- the iPod. That one, as I  
25 said, searches -- that one is I believe currently

1 password protected and we can make it available and  
2 consider further whether -- we can have further  
3 discussions with Mr. Soloway about the password.

4 THE COURT: Okay. My takeaway -- you can  
5 correct me if I'm wrong -- is that -- this is from, Ms.  
6 Necheles, your letter. Your primary concerns are the  
7 timing for the motion, particularly severance, and then  
8 later on, the December motions. This is not a great  
9 schedule for you. You can elaborate.

10 MS. NECHELES: Our primary concern is that  
11 this is not enough time for us to prepare for trial  
12 once we get the discovery. Also, the motion schedule  
13 is not just workable.

14 THE COURT: There's the big question, which  
15 is, are you going ahead in early January or is that  
16 going to change? Let's talk about -- for the  
17 government, you're talking about -- you can make this  
18 production by December 7<sup>th</sup>?

19 MS. PENZA: Your Honor, I want to be clear  
20 that the December 7<sup>th</sup> date that we proposed was not  
21 proposed as a discovery cutoff.

22 THE COURT: So what is it?

23 MS. PENZA: We proposed that date as a date  
24 by which we would endeavor to make substantial  
25 productions on an ongoing basis. Your Honor, we're in

1 a case that has been designated complex. We understand  
2 that the defendants are saying that they want a trial  
3 soon. There has to be a balance of those two things.  
4 The government recognizes that this is a labor-  
5 intensive process on both sides and that the schedule  
6 that we proposed was very complex -- I mean was very  
7 compressed.

8 But a discovery cutoff is really not  
9 something that is customary in criminal cases. The  
10 government isn't aware of a criminal case in which an  
11 arbitrary discovery cutoff was made, absent there being  
12 a fixed trial date. If your Honor would permit me, in  
13 the FIFA racketeering case, which in many ways I think  
14 is one of the most similar cases that has recently been  
15 before this Court, Judge Chen addressed this very  
16 issue.

17 What she said was that she was not going to  
18 set an arbitrary cutoff date. She said that -- if I  
19 may quote from her, she said, "I'm not going to set a  
20 discovery cutoff. I think, as is true in all or most  
21 criminal cases, I should say, it's a rule of reason.  
22 The government will certainly have to explain any  
23 belated disclosure that the defense claims is  
24 prejudicial to them and then the defense will have to  
25 explain why they're prejudiced by this."

1           Your Honor, what the government doesn't want  
2 is an arbitrary cutoff date based on a trial date that  
3 appears not to be set right now.

4           THE COURT: Maybe I'm not -- why is it not  
5 set? You're expecting or hoping that it will change  
6 based on the designation next week?

7           MS. PENZA: Your Honor, defense counsel has  
8 said, based on the date that we have proposed, that  
9 they don't believe that they can -- they don't like the  
10 schedule we proposed. This was the best schedule we  
11 could come up with based on the January 7<sup>th</sup> date. The  
12 government is saying, look, we understand, January 7<sup>th</sup>  
13 is the date that the judge imposed, it's the date that  
14 defendants were saying they wanted, and this is what  
15 will have to happen if that's what they want. I think  
16 that balances the complexity of the case.

17           But we get it, it's very, very compressed  
18 for both sides. It's going to be very labor-intensive.  
19 But if defense counsel wants to move the date, then we  
20 need to have discussions about what a substantial  
21 production date will be, and we will be making rolling-  
22 basis productions. Again, defendants have a lot of the  
23 material already in full, so this concern about a  
24 cutoff whereby we won't be able to use the evidence  
25 doesn't really matter as to things that we've already



1 produced in full. But the government shouldn't be  
2 saddled with a cutoff date at a time when we don't know  
3 exactly when the trial is going to be, so it is a rule  
4 of reason.

5 THE COURT: A couple of things so far you've  
6 said that I can pretty much anticipate the defendants  
7 do not agree with. There's no balance in favor of the  
8 government from their perspective. You want to go to  
9 trial, you have moved ahead with this case. They do  
10 not think that they should have to deal with your  
11 technical problems on the schedule. The balance is  
12 really to protect the defendants, from the defendants'  
13 perspective.

14 There arbitrary cutoff date, I think the  
15 question is, are we talking about information -- you've  
16 alluded to that there may be more going on in this  
17 case. Are we talking about these documents, these  
18 devices, or something else? There's certainly the  
19 possibility -- you mentioned in your letter that it  
20 takes particular effort -- this is my language but this  
21 is the gist of it -- a particular effort to find data  
22 that may not be evidently on a device. Maybe it was  
23 deleted, maybe it was hidden. There's the technical  
24 pieces where it's harder to find it.

25 To the Judge Chen about reason, yes, that's

1 in play, but we're talking about what defendants have  
2 now said several times, information, some of which  
3 you've known about for a while. That seems to be  
4 moving forward, much of which you have had for a while.  
5 These two communications with me were about explaining  
6 the technical challenges. You don't want a cutoff date  
7 but the practical question is, how can the defendants  
8 prepare for this January trial? And you're suggesting  
9 that they should be the ones asking for the extension  
10 when, so far, it's not evident to me that it's their  
11 problem. It seems to be your problem.

12 MS. PENZA: Well, they said that it was.  
13 December 7<sup>th</sup> is the date when the government said, we  
14 can endeavor to make -- and we will stick to that in  
15 terms of, we will try to endeavor to get substantial  
16 discovery out there by then.

17 THE COURT: Try and endeavor, this is the  
18 problem.

19 MS. PENZA: But, your Honor, searches don't  
20 end because of a trial date. That's what I think is  
21 one of the pieces that's missing here. We have  
22 unindicted coconspirators, we have --

23 THE COURT: For this conversation, let's  
24 focus on what we have here.

25 MS. PENZA: Sure but, your Honor, we have

1 obligations to continue to produce discovery to them,  
2 absent any date that is set. And to the extent that  
3 the trial is not looking like it's going to be until  
4 spring or some later date --

5 THE COURT: I can't read those tea leaves.  
6 If that is what happens, then we could certainly come  
7 back and readjust these. But that's not where we are  
8 and that's not the circumstance under which we're  
9 having this conversation. We may go through this, you  
10 have a conversation next week with the trial judge and  
11 the world shifts. We get it.

12 MS. PENZA: Your Honor, I do believe that it  
13 isn't inappropriate for us to refer to this type of  
14 balance. We have done our best. That is the best we  
15 can do is the December date. That's what we said is  
16 the best we can do. And with an aggressive motion  
17 schedule, the government believes that that would -- it  
18 would be tough but we could do it. Defendants are  
19 saying no. They're saying that's not enough time to  
20 review discovery.

21 THE COURT: Right, which does not mean  
22 extend our trial date. It means the government should  
23 be more resources, more lawyers, more everything into  
24 this so that you can get it done.

25 MS. PENZA: Your Honor, respectfully, that's

1 not -- that is the impossibility here because there are  
2 technical things that can't be anticipated as we go  
3 through this. Additionally, the trial team, the  
4 agents, the prosecutors who've been working on this,  
5 they're the ones who need to be conducting this search.  
6 We can't just have-- it may seem fungible but it really  
7 is not. This is a very complex case.

8 THE COURT: Your trial team is -- how many  
9 lawyers are on the trial team? Obviously, you two.  
10 How many others are there? What are the resources that  
11 are dedicated to this?

12 MS. PENZA: Our agents in the first instance  
13 do the searching in consultation with AUSA's where  
14 appropriate. From an agency perspective, we have three  
15 FBI agents assigned to the case as well as a task force  
16 officer. We also have agents from the Department of  
17 Homeland Security.

18 THE COURT: And that does not include  
19 whoever works on it at headquarters, right? That's  
20 separate.

21 MS. PENZA: The headquarters issue is out of  
22 our hands, your Honor.

23 THE COURT: Okay.

24 MS. PENZA: So that's a separate -- that's  
25 totally separate and apart.

1           THE COURT: And then the lawyer? You two  
2 and you're obviously the person who's doing the  
3 teamwork kind of on the side. Are you the only two?

4           MS. PENZA: We are the trial time.

5           THE COURT: You're it, okay. Let me ask a  
6 different kind of question. Your proposed schedule --  
7 this is page 3 of your letter from the 24<sup>th</sup>. For the  
8 Ranieri and Bronfman assertion of privilege, you're  
9 proposing October 19<sup>th</sup>. They have all the materials,  
10 they're going to have all the materials?

11          MS. PENZA: They do.

12          THE COURT: They have that.

13          MS. PENZA: And we've provided it segregated  
14 so they have both the privileged set and the non-  
15 privileged set.

16          THE COURT: And then the --

17          MS. PENZA: I'm sorry, the potentially  
18 privileged set, your Honor.

19          THE COURT: Ms. Salzman -- is this by the  
20 October 5<sup>th</sup> date? Is this what you're talking about?

21          MS. PENZA: Yes.

22          THE COURT: One particular concern in  
23 defendants' letter, the one at 149 on the docket, is  
24 the severance motion. The choice to make the motion  
25 seems tied -- potentially tied to the discovery.

1 You're suggesting it happen October 12<sup>th</sup>?

2 MS. PENZA: There are other types of  
3 motions, your Honor, that are encompassed within those  
4 facial challenges. There are facial challenges to the  
5 indictment, certain other motions that are  
6 contemplated.

7 THE COURT: Right.

8 MS. PENZA: I will note, your Honor, that  
9 this is modeled after a similar schedule that Judge  
10 Chen did set in FIFA. She had staggered briefing  
11 schedules where motions addressed to the allegations  
12 themselves, the facial allegations of the indictment,  
13 were due first, and then motions which involved a  
14 deeper dive into discovery were next. We think that  
15 makes sense here, your Honor.

16 THE COURT: I'm just highlighting and trying  
17 to get your response to the point that was made on page  
18 2 of the letter at 149 that the severance motion is --  
19 to read it, "that is simply not possible by October  
20 12<sup>th</sup>." I assume -- we can hear from counsel but the  
21 reason would be you're talking about the discovery  
22 coming in almost two months -- whatever word you want  
23 to use, a very significant part of the discovery, if  
24 not all of it, having been produced by December 7<sup>th</sup>, two  
25 months later, and deciding whether they're interested

1 in severance motions may depend on what the discovery  
2 shows. So I'm wondering why you think that's -- I  
3 understand the facial piece but why that particular  
4 motion could be made in an informed way so early  
5 relative to the production of the discovery.

6 MS. PENZA: Your Honor, I'm not sure what  
7 the anticipated basis for the motion for severance is.  
8 There are many such bases. Should we hear from defense  
9 counsel that they anticipate to make one that's  
10 specific to certain discovery, that makes sense. That  
11 objection makes sense. But should it just be a blanket  
12 objection to filing these types of motions early, we  
13 think these are addressed by the face of the  
14 indictment. There are motions to sever that could be  
15 filed that don't involve a wholesale review of  
16 discovery.

17 THE COURT: But are you suggesting they  
18 should be allowed to make two motions to sever if  
19 appropriate, one up front based on information known  
20 now or in or around the dates that you're proposing,  
21 and another made later?

22 MS. PENZA: If it makes sense, your Honor.  
23 I think if their motion to sever is addressed to the  
24 face of the indictment, it makes sense for them to do  
25 it now. If, for example, based on a particular piece

1 of discovery or otherwise, they decide then this motion  
2 to sever is grounded on a particular client based on  
3 this -- it's a reasonable question, your Honor. We are  
4 endeavoring to make a schedule that is reasonable. So  
5 should defense counsel say, we can't file this  
6 particular type of motion, we couldn't have filed it  
7 earlier, we'd like to make it now, I think that makes  
8 sense.

9 THE COURT: I should have said the  
10 preliminary statement, which I assume we all know,  
11 right, from the trial judge's previous order. These  
12 particular scheduling issues will be decided by him but  
13 the discovery-related ones -- this is all running in  
14 tandem, right? I'm dealing with the discovery, which  
15 may or may not affect these other dates.

16 Defense, your concern is for the government  
17 to make as thorough a production as possible by the  
18 December 7<sup>th</sup> date.

19 MS. NECHELES: Your Honor, I would note that  
20 one of the things -- I think the government said two  
21 things that I just want to add a little comment on.  
22 One is that judges in other cases -- the government  
23 said that judges in other cases don't set discovery  
24 cutoffs. I totally disagree with that. In every case,  
25 judges set discovery cutoffs for Rule 16 material



1 that's already in the government's possession, that  
2 they should produce it six months, nine months before  
3 trial. That's what we're talking about, not things  
4 that maybe they discover later. Obviously, that's a  
5 different issue and the government -- we can deal with  
6 that at the time should there be other things. But  
7 what we're talking about here and what these charts  
8 talk about are things that are in the possession and  
9 that have been in the government's possession for a  
10 long time.

11           The other thing the government said is that,  
12 obviously, there will be continuing searches. That's  
13 not okay. The government has to do their searches and  
14 then turn over to all of the codefendants everything,  
15 and they can't keep using that body of material to keep  
16 doing searches because that would mean that the  
17 government had material in their possession that the  
18 defendants don't have, that is potentially material to  
19 the charges at trial. That would violate Rule 16  
20 because the defendants are entitled to everything that  
21 is material to the trial. So the government has to  
22 compete its searches pursuant to the warrants, turn  
23 over everything to us, and they can't keep using that  
24 database to keep searching because that would be a  
25 total violation.

1 THE COURT: They can't keep using --

2 MS. NECHELES: They computers that they --

3 THE COURT: -- the non-responsive material.

4 MS. NECHELES: Yes, to do new searches  
5 because that would be a total violation of Rule 16 and  
6 the warrant.

7 THE COURT: I think -- let me just clarify.  
8 I'm not sure -- for the government, was your point a  
9 technical point that because you're doing this on a  
10 rolling basis and there's some material that you,  
11 relatively speaking, can access for the search reliably  
12 and fairly promptly, but there are other parts of the  
13 searches that are, as you described briefly in your  
14 letter, more technical. You just are not going to know  
15 whether you have accessed and reviewed everything for a  
16 while.

17 MS. PENZA: Are you referring to the letter  
18 we filed, your Honor? I believe Ms. Necheles is  
19 referring to something -- is making a general point  
20 about the propriety of searching --

21 THE COURT: I am but I think --

22 As I understand it, Ms. Necheles, you're  
23 responding to the government's point that -- the  
24 suggestion that there could be ongoing searches.  
25 You're saying no, you have to basically finish your

1 warrant-permitted search and that's it.

2 MS. NECHELES: Yes.

3 THE COURT: I'm going back to the government  
4 to clarify because I thought the way this was coming up  
5 was because you're doing something on a rolling basis  
6 to comply with the warrant but some parts of it you can  
7 search fairly simply and other things are going to be  
8 harder to search, so you're not going to know until you  
9 do the harder searches that you've finished the search  
10 for the warrant. Maybe I'm wrong. It's not that  
11 you're planning to go through everything, produce what  
12 you think should be produced, and then do it again  
13 expecting to find more.

14 MS. NECHELES: Or run different search terms  
15 because now they think something else relevant or in  
16 the middle of the trial say, I'm curious about this.  
17 Somebody just testified, let me go back.

18 THE COURT: Right.

19 MS. NECHELES: That is what's impermissible  
20 also under U.S. v. Wei (ph) and Rule 16.

21 THE COURT: Let's go back to the technical  
22 point. Go ahead.

23 MS. PENZA: Your Honor, we're aware of  
24 United States v. Wei. We think at this juncture, the  
25 point that Ms. Necheles is raising is academic. First,

1 we're talking about how we're going to get responsive  
2 results from our search to defendants, and the Court  
3 and the parties are all engaged in that discussion.  
4 Whether or not we're complying with the searches under  
5 -- we're executing the search warrants properly is a  
6 separate question that can be raised in some kind of  
7 motion practice that's not before this Court right now.

8 THE COURT: My understanding of the  
9 defendants' point is that this goes in tandem. You  
10 need to have a deadline and at that deadline, if the  
11 government -- you haven't done your search, basically  
12 the defendants' perspective is, that's it. You don't  
13 get to go back and search. I was making the  
14 observation that maybe, because of the way you've  
15 described the rolling production based on the  
16 technological challenges, there may be a period between  
17 here and whatever that deadline turns out to be, even  
18 though I know you don't want a deadline, so that you're  
19 not holding on to information that you know you have.  
20 You just will not have gotten to it based on the  
21 technical issues.

22 So your perspective is what?

23 MS. PENZA: Your Honor, there's a difference  
24 between completion of a search and a deadline by which  
25 we have to produce materials so that the defendants

1 have an opportunity to review it adequately and prepare  
2 for trial. We're focused on the latter right now.  
3 When will that point be that the defendants -- that a  
4 court could say, this is the deadline by which you have  
5 to provide material responsive to the warrants that you  
6 intend to use at trial. Whether or not our search of  
7 the material as to the warrant is ongoing is a separate  
8 question, your Honor.

9 THE COURT: The distinction is lost on me,  
10 sorry.

11 MS. HAJJAR: Sorry, your Honor. The  
12 government accepts that there has to be a certain point  
13 at which the government -- to prevent unfair surprise  
14 or prejudice to the defendants, that there should be an  
15 effort to have provided everything it expects to use at  
16 trial. But of course, there can always be other  
17 things, and then we would make arguments and say,  
18 defendants aren't prejudiced because this is  
19 substantially similar to other things we produced,  
20 those kinds of things.

21 But their remedy, if the Court should  
22 choose, is to say okay, government, you provided it too  
23 late. You can't use that evidence, it's unfairly  
24 prejudicial. But the issue of whether, under the  
25 Fourth Amendment, we are properly complying with a

1 search where we have unindicted coconspirators, where  
2 there is an ongoing investigation in this case, you  
3 can't -- there shouldn't be a you have to end your  
4 search tied to a discovery deadline, and there's on  
5 precedent for that.

6 THE COURT: To the back table.

7 MS. NECHELES: Your Honor, I think the  
8 government is confusing two things. What was just  
9 mentioned was the government turning over to us what  
10 they intend to use at trial. But I'm talking about  
11 Rule 16 discovery that covers a much broader area,  
12 what's material, what might be material to the defense.  
13 Whatever database gets returned from the search  
14 warrants -- whatever is the return on these warrants is  
15 material to the defense.

16 MS. HAJJAR: Your Honor --

17 THE COURT: Hold on, don't interrupt.

18 MS. NECHELES: Therefore, by its nature,  
19 there are things that go to the charges here and  
20 clearly, when they got those search warrants executed,  
21 they thought that there were things that were material  
22 -- are material to the charges here. That's why they  
23 got those search warrants. So if they are material to  
24 the charges or they touch upon a witness or they refer  
25 to Nexium, it's material to the defense. So if it's

1 return on a search warrant, I'm entitled to the whole  
2 thing. They can't have a database that they are using  
3 to keep looking at things for this trial that I don't  
4 have. The entire database is material to the defense  
5 and I'm entitled to have it with enough time to prepare  
6 for trial.

7 So that's why they have to finish the search  
8 warrant, finishing executing the search warrant, and  
9 turn over to me everything that they got responsive to  
10 the search warrant, unless they can really say it has  
11 no materiality to the defense, and I don't think that  
12 it is possible under any of these search warrants to be  
13 saying that they are not material to the defense. It's  
14 a very broad standard, very broad standard.

15 THE COURT: And your thought about the time  
16 line of December 7<sup>th</sup> is what?

17 MS. NECHELES: With this massive amount of  
18 material, I cannot prepare for a January trial with  
19 this material being returned by December. Basically,  
20 the vast majority of it, the government is saying,  
21 we're going to endeavor to prepare and produce by  
22 December. I guess the government could choose and say  
23 that they don't need all this stuff and they're just  
24 not going to be using any of it and they're not going  
25 to execute the searches, so produce to us stuff that

1 they have determined is material and do it now. They  
2 arrested everybody months and months and months ago.

3 THE COURT: So everybody is making an  
4 estimate somewhat in the dark. But if you were going  
5 to estimate, based on what you have heard is going to  
6 be produced on a rolling basis, how much time would you  
7 need to review it?

8 MS. NECHELES: Judge --

9 THE COURT: You're saying a month is not  
10 enough so --

11 MS. NECHELES: It's hard to say. I don't  
12 know what's on there. I would think that I would need,  
13 at a minimum, three months to be preparing for trial  
14 with this stuff, at a minimum. I don't know what's on  
15 there. I need to upload, I need to make sure it's been  
16 produced in a form I can use.

17 THE COURT: Hopefully -- that's part of this  
18 conversation that as things are -- that was from last  
19 week's conversation, isn't it. Everybody has gotten  
20 some material. I'm going to put an asterisk next to it  
21 but if there are technical issues that anyone is having  
22 with the production, you should be identifying it  
23 immediately so that we're not looking and assuming that  
24 things that have been produced are unusable.

25 MS. NECHELES: I agree, your Honor, and we



1 take that as our responsibility. We have been doing  
2 that and we've been contacting the government with any  
3 problems, and they've been working to work them out.  
4 We do understand our responsibility.

5 THE COURT: And it's been going okay?

6 MS. NECHELES: I beg your pardon?

7 THE COURT: You made the caveat that the  
8 three-month minimum is without technological problems  
9 on your side.

10 MS. NECHELES: Just because I know -- I know  
11 that as it goes along, things get -- there are often  
12 problems, even when everybody is acting in good faith.

13 MR. AGNIFILO: Your Honor, if I could just  
14 complete the thought.

15 THE COURT: Okay, yes, other views.

16 MR. AGNIFILO: Thank you, Judge, only  
17 because Mr. Ranieri is in prison. And the government  
18 -- while I understand the government's difficulty in  
19 the task at hand, they've been adamant that they're not  
20 going to agree on any bail package. So I'm in quite  
21 the pickle because in answer to this problem -- I know  
22 this is not the issue before your Honor.

23 THE COURT: We might as well put it on the  
24 record here so you all know what's happening next week.

25 MR. AGNIFILO: Right. The discovery is more

1 voluminous than we thought and it's taking longer to  
2 put together than we thought. Maybe there's a bail  
3 package that would make sense that we can live with.  
4 They're never going to say that. They couldn't have  
5 been clearer. They're never agreeing to let him out.  
6 As a result, I don't think I'm going to get him out.

7           So I don't have the luxury of taking three  
8 months to look at the discovery. I just don't. So  
9 whether I can do it in a month, whether I can do it in  
10 six weeks, eight weeks, I have an obligation to Mr.  
11 Ranieri in the position that he's in, to do it faster  
12 than three months. So I just wanted to complete the  
13 thought. And I'm not trying to add ambiguity or  
14 dissension to the record. I just had to put that on  
15 the record.

16           THE COURT: Meaning that you're never going  
17 to be the person asking for an extension here, as  
18 things stand now.

19           MR. AGNIFILO: I want to try the case  
20 January 7<sup>th</sup>. Sometimes my colleagues don't always agree  
21 with that and I'm trying to harmonize all the views.  
22 And I'm not even finding fault with the government in  
23 what I'm saying. I'm just stuck in a situation that  
24 I'm in and it's really incumbent upon me, I think, to  
25 move as quickly as possible. So my position is that we

1 start the trial on January 7<sup>th</sup>. I'm looking to be  
2 accommodating to different views but I'm not in a  
3 position to say that it's going to take me three months  
4 starting in the second week of December to look at this  
5 discovery, which puts us into mid-March, I guess, which  
6 I think is too long. That's it, just to the complete  
7 the thought.

8 THE COURT: Right.

9 MR. AGNIFILO: Thank you, Judge.

10 THE COURT: Others, your view? Any other  
11 views?

12 MR. MCGOVERN: I don't think we have  
13 anything to add to that. We're going to work to the  
14 schedule that gets set. We are concerned about getting  
15 firm deadlines on discovery but we have nothing else to  
16 add.

17 THE COURT: Okay. We're working from  
18 December 7<sup>th</sup>. This is a tandem effort with the trial  
19 judge but it's his trial, so he can decide that this is  
20 going to be something different. Let's go back to the  
21 chart which is part of the 25<sup>th</sup> and get some idea of  
22 when you will know what the productions are going to be  
23 or the best way for the government to update everyone.  
24 A December 7<sup>th</sup> data dump does not help anybody.

25 I agree with the government that there would

1 be a reasonableness analysis but what is reasonable is  
2 shaped by all of the facts that have come forward so  
3 far, and this is an effort to really, really do this  
4 expeditiously. The problems, by the time you get to  
5 December 7<sup>th</sup>, would need a lot of technical and resource  
6 explanation.

7           You have some definite dates. Looking at  
8 your chart, when do you think you might get an update?  
9 I think one thing you've said that's a little bit  
10 concerning, maybe a lot concerning, is this idea of  
11 there's a queue. I have no idea what's going on in the  
12 rest of the country. If you're at the front of the  
13 queue, great. If you're at the back of the queue and  
14 there's -- I don't have any sense of the centralized  
15 resources on that front. If they're just going to say,  
16 we'll get to it when we get to it, that's not great.

17           MS. PENZA: Your Honor, may I address some  
18 of those questions.

19           THE COURT: Sure, yes.

20           MS. PENZA: Just one thing I just want to  
21 correct. It is not at all the government's proposal to  
22 do a data dump on December 7<sup>th</sup>. We are sensitive to the  
23 defense's desire to access discovery. That is why we  
24 are -- we would love to make full discovery copies of  
25 all electronic devices as early as possible.

1 THE COURT: Right. So far, they haven't  
2 gone for that.

3 MS. PENZA: That hasn't happened yet.

4 THE COURT: Right.

5 MS. PENZA: Your Honor, one thing we did  
6 invite in our letter is, should Nancy Salzman's  
7 attorney determine that, based on their review of a  
8 particular device, there isn't much of an objection to  
9 having it made in full to all defendants. We would  
10 just ask that that be noted to the government. We will  
11 make that particular device available in full to all  
12 defendants promptly.

13 THE COURT: I think you already know that.  
14 If that turns out to be the case, it would be great if  
15 you could let everybody know to move this along.

16 MS. PENZA: With respect to the items that  
17 have been sent to Quantico, your Honor, there is -- we  
18 have absolutely no control over how those devices and  
19 how those -- if those devices will be accessed and how  
20 the information will be gathered from those devices.  
21 At present, they're not accessible. The information on  
22 them is not accessible to the government.

23 THE COURT: Let me just understand what  
24 you're saying.

25 MS. PENZA: Yes.

1 THE COURT: That means technologically --

2 MS. PENZA: Technologically.

3 THE COURT: -- nobody in the government can  
4 do it, or you're not at the top of the list so they're  
5 not even trying to figure things out for you. What  
6 does it mean that it can't be done?

7 MS. PENZA: It currently cannot be accessed.  
8 It is possible that attempts can be made to access  
9 those, to brute force those devices, for example. But  
10 there is a queue. It's a very specialized laboratory.  
11 These devices may not be at the head of the queue and  
12 we cannot give an estimate as to at what time they will  
13 be. That said, your Honor --

14 THE COURT: Just so I'm clear, those are  
15 just the ones that are at the FBI headquarters?

16 MS. PENZA: Correct.

17 THE COURT: So it's a modest, relatively  
18 speaking, part of this list.

19 MS. PENZA: Yes, your Honor, and I'll just  
20 note, to the extent that trial comes and goes and the  
21 devices haven't been accessed -- I just merely point  
22 out that this is a premature issue. Should the  
23 government come into possession, be able to access the  
24 information on these devices, that would be a proper  
25 time to determine when and if that information could be

1 used, what we should do about that.

2 THE COURT: There's no decision. The  
3 purpose of my questions right now is, you have  
4 helpfully added some dates to the chart, the second  
5 version of the chart. I was starting with what seemed  
6 then to be potentially the most difficult other dates.  
7 Those are the TBD's. So you're saying technically, you  
8 just don't know. So then there's a whole other set of  
9 dates on here that search commenced and ongoing. When  
10 would you have an estimate or even a prediction?

11 MS. PENZA: Your Honor, some of those  
12 devices are subject to claims of privilege, so it does  
13 make sense to have a set schedule to determine claims  
14 of privilege because, for obvious reasons, we can't --  
15 unless those potentially privileged materials are  
16 sorted through and there's a determination about them,  
17 we can't provide that information, that bucket of  
18 potentially privileged materials.

19 THE COURT: I understood, correct me if I'm  
20 wrong, from our conversation previously, the way that  
21 works is essentially, you've gotten the lawyers'  
22 contact and identifying information. Your colleague is  
23 basically handling that. You're going to segregate out  
24 the privileged material, we'll deal with it on the  
25 motion. You don't know or at least you didn't know

1 sitting here whether that was 1%, 2%, we don't know  
2 what that is. But everything else is subject to your  
3 search and production. So putting the privilege aside,  
4 what about the rest of it?

5 MS. PENZA: Just to clarify, your Honor,  
6 you're asking with respect to non-potentially-  
7 privileged materials on the items that have been  
8 highlighted potentially -- that may have potentially  
9 privileged materials, you're asking how long it will  
10 take the government to produce responsive results to  
11 those?

12 THE COURT: I guess it may be exactly the  
13 same question. The ones I was focused on were the ones  
14 that are identified as searched, commenced, and  
15 ongoing, focusing on the non-privileged material.

16 MS. PENZA: It depends, your Honor. Some of  
17 these, for example the 8 Hale Drive devices have been  
18 produced in full to the defendants or will be by a  
19 particular date.

20 THE COURT: I'm sorry, which ones are we  
21 looking at now?

22 MS. HAJJAR: 1B50, your Honor, and then  
23 down. So all the 8 Hale Drive materials have either  
24 been provided to all the defendants now or will be  
25 provided by October 5<sup>th</sup>. Even though it says search



1 commenced and ongoing --

2 THE COURT: This is an update? Okay.

3 MS. HAJJAR: No, it's in there. But what  
4 I'm saying in terms of the search being -- the fact of  
5 the search having commenced and being ongoing is really  
6 irrelevant to the conversation we're having because the  
7 defendants have that, have the full ability to search,  
8 just as Ms. Necheles was describing. They have their  
9 vendors. They will have full access the same way the  
10 government has by October 5<sup>th</sup> --

11 THE COURT: Okay.

12 MS. HAJJAR: -- to everything at 8 Hale.

13 THE COURT: So you're saying the ones that  
14 are marked as (ui), not so important because everybody  
15 has it, right?

16 MS. HAJJAR: Yes, your Honor.

17 THE COURT: But the ones that are not all --

18 MS. HAJJAR: We've laid out aggressive  
19 deadlines for ourselves for the stuff that was not at  
20 Nancy Salzman's house. Your Honor, what we're really  
21 talking about here is just Nancy Salzman -- the devices  
22 from Nancy Salzman's house.

23 THE COURT: Okay.

24 MS. HAJJAR: That is where there is  
25 difficulty. For example, two laptops recovered from

1 Nancy Salzman's house, Mac computers. Just the time to  
2 get them on to our vendor system, converted from Mac,  
3 to be in the proper format, which will then be in the  
4 proper format for the defendants and usable for them,  
5 that has taken over two weeks just for us to get it on  
6 to the system so that the search terms could be run to  
7 segregate them out. So that's just two devices, your  
8 Honor. That's an example of the technicalities here  
9 and why it's very difficult for us to be able to give  
10 you more definitive estimates of when.

11 THE COURT: Let me ask what may be  
12 completely naïve question, but why seriatim instead of  
13 parallel? Why isn't it all the devices all hooked up?

14 MS. HAJJAR: Because they can't do that. It  
15 takes time to go through. We have a platform and they  
16 upload them as we get them. So they have a queue of  
17 additional items that we've provided them, that we're  
18 waiting to get on to the platform. This is one of the  
19 most reputable vendors in the business. They've been  
20 doing this for a very long time. I don't believe it's  
21 an issue of resources on their part. We have committed  
22 in the same way I'm sure defendants have committed to  
23 their vendor and have put a lot of resources towards  
24 that. So it's happening and then the searches have to  
25 happen, and it's an ongoing process. Searching is an

1 ongoing process, as was described in our letter. There  
2 are hidden files, there are things like that.

3           There are parallel processes going on, your  
4 Honor. Not everything has to be uploaded to our  
5 vendor. There are other items, for example, where we  
6 have just produced the results of the search. I think  
7 one of those was like an 8 Hale camera, for example.  
8 We just pulled out the pictures out and gave them  
9 everything. That search is done. But there aren't --  
10 it's difficult because the things that are really going  
11 to be the most time intensive that really are going to  
12 result in what Ms. Necheles is afraid of, getting a  
13 large data dump and then having to sift through it,  
14 those are the things that are difficult for us to give  
15 an estimate to, and that's the problem. There's really  
16 no way around that, your Honor. That's why ultimately,  
17 the --

18           THE COURT: That's the problem. There is a  
19 way around it by expanding the resources. The question  
20 is, is that possible or practical or reasonable to  
21 demand? You two can only do so much work and whoever  
22 is working with you. So at some point, even if you  
23 were to enhance the technical ability, you might hit a  
24 bottleneck. Maybe you could be assisted, but I  
25 understand your point that the people with more

1 thorough knowledge of the case are the best to go  
2 through the material.

3           What's your suggestion? We need a plan here  
4 and I understand your motions -- it will be decided by  
5 the district judge against the backdrop of this  
6 discovery. The ones that will come to me are probably  
7 these privilege motions. You think I a week you're  
8 going to know more?

9           MS. PENZA: Sorry, your Honor. Our  
10 suggestion is laid out in our letter. Currently, the  
11 trial is set for January. We can proceed with that in  
12 mind and go forward. I think defense counsel's letter,  
13 as I read it, does not have a problem with that. I'll  
14 just note --

15           THE COURT: I'm sorry. Your letter  
16 suggests --

17           MS. PENZA: It sets forth a schedule, your  
18 Honor, by which -- for those devices for which we have  
19 dates, we will abide by those deadlines and then --

20           THE COURT: I'm sorry. Are you talking  
21 about your chart? Am I missing something?

22           MS. PENZA: Partly our chart, your Honor,  
23 and partly the general deadline involving privilege  
24 logs, scheduling of any --

25           THE COURT: Which one, this one?

1 MS. PENZA: Yes, your Honor.

2 THE COURT: Right, and this one, okay. You  
3 have this. Except for the privilege point, this will  
4 generally be dealt with by the district judge. I am  
5 still asking the same question about -- I get the focus  
6 on Ms. Salzman's devices -- when you will have a better  
7 handle on the production schedule because it's not fair  
8 or realistic to think that defense counsel can plan how  
9 they're going to defend if they don't have any idea  
10 what is coming in when. You're telling me here you  
11 don't know. This is putting aside the ones that have  
12 the very technical problems, the ones that are marked  
13 as TBD.

14 MS. PENZA: Your Honor, we've given  
15 ourselves deadlines going through the next -- October.  
16 We are going to do our best efforts to get as much out  
17 for the other devices on a rolling basis. I do want to  
18 note that what I think is a sensible approach is to be  
19 sensitive to what defendants want. For example, we've  
20 received requests -- we received comments or requests  
21 in the vein of, what we really want are these  
22 communications. What we don't want are hours and hours  
23 of lectures. We don't want that so please don't -- we  
24 want you to prioritize what would be --

25 THE COURT: Just put that on hold for one

1 second because I think that's a helpful point and it  
2 would be good to be discussed here. But still, in  
3 general, when will you know -- let's focus on the  
4 Salzman devices -- what the likely technical schedule  
5 could be? Obviously, if they tell you, we are most  
6 interested in 1B93, you'll move that to the front of  
7 the list. Any idea?

8 MS. PENZA: Your Honor, we could submit a  
9 letter -- you could direct the government to provide a  
10 letter in three weeks updating your Honor about what  
11 efforts have been made to get discovery out and what  
12 remains, and we've have a better idea then.

13 THE COURT: So you think three weeks is when  
14 you would be able to report on progress and  
15 predictions?

16 MS. HAJJAR: I think that's fine, your  
17 Honor, bearing in mind -- we just want the Court to  
18 acknowledge we have set very aggressive deadlines for  
19 the certain -- for items not Nancy Salzman's phone, so  
20 we certainly were attempting to prioritize those.

21 THE COURT: There's no criticism that you're  
22 not -- I'm not suggesting, nor do I think defendants  
23 are suggesting that you're not working hard. The point  
24 is that this is an enormous task on a short deadline.  
25 So it's how to deal with that problem, not that you're

1 not trying.

2 MS. HAJJAR: No, and I wasn't taking it that  
3 way, your Honor. What I just want to emphasize is that  
4 we have prioritized the emails and electronic items  
5 that defendants have also expressed an interest in  
6 having sooner rather than later.

7 THE COURT: Okay.

8 MS. HAJJAR: So we will have to be working  
9 on parallel schedules.

10 THE COURT: Okay.

11 MS. HAJJAR: But I think what your Honor is  
12 really asking -- in three weeks, will we have a better  
13 idea technically?

14 THE COURT: Yes, that's step one.

15 MS. HAJJAR: Yes, I think we will have a  
16 better idea technically.

17 THE COURT: Okay. Back to your colleague's  
18 point, you have heard some requests from some  
19 defendants about a priority, the materials they are  
20 interested in.

21 MS. PENZA: Yes, your Honor, but we will  
22 continue to be sensitive to that. My point is simply  
23 that, if in a week or two, as we prepare to make our  
24 report to the Court, should we hear from defense  
25 counsel about a priority, we would like to incorporate

1 that and focus on those devices that are likely to  
2 yield fruitful results.

3 THE COURT: Okay, two things that obviously  
4 would feed into some reasonableness analysis if it  
5 becomes necessary to make that, but I thought you were  
6 not all on the same page about your priorities from our  
7 conversation two sessions ago.

8 MR. AGNIFILO: I think we are, Judge.

9 THE COURT: Is that any better, any worse,  
10 any closer, any overlap? Has the diagram gotten any  
11 better.

12 MR. AGNIFILO: I think that the government  
13 knows our priorities and I think they've been trying to  
14 produce according to our priorities.

15 THE COURT: Not to interrupt but who is  
16 "our," because I thought there was a disagreement about  
17 -- from this side of the room. I'm not sure I can  
18 remember --

19 MR. AGNIFILO: There are a couple of general  
20 principles and if any of my colleagues disagree, they  
21 will let me know. I think my colleagues with the  
22 government alluded to the fact that there's so much  
23 data space taken up by videos, videos of people talking  
24 and lectures. That is really -- someone might disagree  
25 with me. That's the lowest priority. The highest



1 priority are email accounts.

2 THE COURT: Which do seem to be moving  
3 forward, right?

4 MR. AGNIFILO: Yes, I think we are.

5 THE COURT: Okay.

6 MR. AGNIFILO: And the government I think is  
7 trying to work with us, and I appreciate it.

8 THE COURT: Okay. What's your second-  
9 highest priority?

10 MR. AGNIFILO: You stumped me with that one.  
11 I only know my highest priority.

12 THE COURT: Interesting world view but okay.  
13 That's for your client. Everybody else?

14 MR. AGNIFILO: Yeah. Secondarily, I guess  
15 there are things like phone records, bank records,  
16 things like that. What's clearly in the basement of  
17 our priority list, the lowest priority, really are the  
18 videos. The reason that we're trying to focus on that  
19 is, I think in terms of just the terabyte space, so  
20 much of it is taken up by videos. Really what's  
21 helpful in making just the raw mass of information  
22 almost more manageable is almost to cut that stuff out  
23 for the time being and say, give us the emails, give us  
24 the records.

25 THE COURT: So now maybe I have to ask a

1 followup from a question I asked before. I thought  
2 from previous conversation, the government was not yet  
3 in a position to say what was video and what was not.  
4 Has that changed?

5 MS. PENZA: Your Honor, we are able to -- it  
6 has been inventoried in a sense. We can figure out how  
7 many video files are on what device.

8 THE COURT: That's moving forward. That's  
9 good.

10 MS. PENZA: I think the point is whether --  
11 notwithstanding what Mr. Agnifilo just said, the  
12 probative value of those videos obviously requires  
13 listening to them and sort of delving deep into what  
14 the file is.

15 THE COURT: In our previous conversation,  
16 you weren't even up to that stage. Now you know video  
17 versus whatever the other options are at this point.

18 MS. PENZA: May I just explain how this --

19 THE COURT: Sure.

20 MS. PENZA: If you are viewing a device in  
21 FBI's review database, you can see each file.  
22 Sometimes the file type is designated, making it  
23 obvious to the person what it is, an MP3 or a video  
24 file. Sometimes it's not entirely obvious for reasons  
25 that I probably can't explain to your Honor because I

1 don't know, but there are files where the file name  
2 isn't immediately obvious. But certainly yes, there  
3 are ways to determine this device appears to have a lot  
4 of audio or video.

5 THE COURT: And you have those kind of  
6 indexes now for the devices that you can access.

7 MS. PENZA: We have noted where we -- we've  
8 noted two devices, your Honor, in our letter where we  
9 just noted to the Court and the parties where we  
10 thought there were substantial numbers of audio or  
11 video files. So as we continue to look through each of  
12 these devices and see where we -- see the video files,  
13 we can make note of that and pass it along to defense  
14 counsel.

15 THE COURT: So for two devices, you know  
16 that, is that right?

17 MS. PENZA: I'm sorry, your Honor?

18 THE COURT: Is it for two devices, you know  
19 that?

20 MS. PENZA: Two devices where there was a  
21 particular large number of audio and video files.

22 THE COURT: But you could do that quick view  
23 indexing effort on the other devices and get a  
24 handle --

25 MS. PENZA: Yes, your Honor. It does take

1 time because it's not user friendly. This system is  
2 unfortunately not user friendly or particularly  
3 intuitive but yes, it can be done. But I'll just note  
4 that one of these devices is particularly large. There  
5 are video and audio files but there are also email  
6 correspondence and other items which may be of interest  
7 to defense counsel.

8 THE COURT: Which one was that?

9 MS. PENZA: That is -- I believe it's 1B89,  
10 your Honor.

11 THE COURT: The 333 gigabytes? Okay.  
12 You're putting video at the bottom and email at the  
13 top.

14 Other defense counsel, your preferences,  
15 your priorities, your thoughts about any of this?

16 MR. SOLOWAY: Judge, I have one observation,  
17 I think I would call it, on --

18 THE COURT: Do you mind -- can you use a  
19 mic?

20 MR. SOLOWAY: On behalf of Nancy Salzman.

21 THE CLERK: Speak into the mic.

22 THE COURT: It's hard to hear.

23 MR. SOLOWAY: Thank you, Judge. I think  
24 following up on something Ms. Necheles was talking  
25 about and trying to figure out how the case can be

1 moved to trial, where the discovery schedule, at least  
2 the government keeps saying it's inappropriate, unfair,  
3 not really consistent with the law to set a discovery  
4 cutoff. Ms. Bronfman's lawyer was kind of responding,  
5 that doesn't really apply in the case of materials that  
6 the government has in their possession. Yes, there's  
7 obviously continuing investigation but --

8           For example, in our situation with Nancy  
9 Salzman, it has to be remembered, I think, that with  
10 respect to search warrants that were attributable to  
11 Nancy Salzman, that consisted of the 8 High Drive and 3  
12 Oregon Trail premises. We asserted absolutely no  
13 attorney/client privilege issues with respect to 8 Hale  
14 Drive in its entirety. We gave the government a list  
15 of 42 to 45 devices from the 3 Oregon Trail that we  
16 also asserted no attorney/client privilege.

17           THE COURT: And just so I'm clear, no  
18 privacy either, right?

19           MR. SOLOWAY: We didn't say anything about  
20 privacy. They were recovered in Nancy Salzman's home  
21 but we didn't assert privilege.

22           THE COURT: Okay.

23           MR. SOLOWAY: Attorney/client privilege with  
24 respect to those devices.

25           MS. PENZA: We're on a fundamental

1 misunderstanding then of how we've been proceeding,  
2 your Honor, based on that.

3 THE COURT: Okay.

4 MR. SOLOWAY: Let me just ask one particular  
5 question, and that relates to the discovery cutoff  
6 issue at this moment.

7 THE COURT: Okay.

8 MR. SOLOWAY: Because with respect for  
9 example to an item that we made no assertion --  
10 specifically, what we did was we said that no  
11 attorney/client privilege issues are asserted with  
12 respect to these particular 42 devices, and I have the  
13 email in front of me. One of them happens to have been  
14 this Kiosara (ph) phone --

15 THE COURT: The one they can't get into?

16 MR. SOLOWAY: -- that is identified in the  
17 government's chart as something that had to go out to  
18 -- it's on page -- it's IB74.

19 THE COURT: 74, right.

20 MR. SOLOWAY: So in order to get some kind  
21 of order, is there a principle that can operate that  
22 would say that there's going to be a trial on a certain  
23 date. This particular phone is sent to the FBI  
24 headquarters. There's been no -- there should be a  
25 point at which the government can't just continue to

1 say, we might one day break into this phone or force  
2 this phone open. These are things that they've had  
3 since March 27<sup>th</sup>, 2018, and we're still now, at the end  
4 of September, learning that we don't know when if ever  
5 we're going to see the contents of this phone.

6 I don't know whether the phone is important.  
7 We haven't asserted anything with respect to  
8 attorney/client privilege as to it, but there are --  
9 there can't be, with respect to things that the  
10 government has, just a continuum that goes on forever  
11 and be consistent with an actual firm trial date.

12 THE COURT: I think it's reasonable, for the  
13 things the government has described all summer as  
14 technologically challenging, which seems to be the ones  
15 that are TBD, to get an update in some period of time.  
16 But you're saying -- is there a point you want to make  
17 about the 42 minus the TBD's? There was some sense of  
18 a misunderstanding here so --

19 MS. NECHELES: Your Honor, could defendants  
20 take one minute?

21 THE COURT: Counsel, why don't you speak for  
22 one second because I'm not sure where this is.

23 (Tape off, tape on.)

24 THE COURT: We're back on the record. Yes,  
25 sir.

1 MR. SOLOWAY: -- what particular interests  
2 were asserted with respect to 8 Hale Drive right now.  
3 My only answer to that is that I have to go back and  
4 look at the communications that were made between my  
5 firm and the government and also discuss it with the  
6 government.

7 THE COURT: Okay.

8 MR. SOLOWAY: I'm not going to say anything  
9 further about it right now because I don't have the  
10 records in front of me of what communications we made.

11 THE COURT: Can you have that in the next  
12 couple of days?

13 MR. SOLOWAY: Yes, of course.

14 THE COURT: Okay.

15 MR. SOLOWAY: Yes, I can have it, yes.

16 THE COURT: Friday, Monday?

17 MS. PENZA: Your Honor, every discussion in  
18 this case has been with the understanding that the  
19 government was providing everything pursuant to 8 Hale  
20 because the defendant was asserting -- because Nancy  
21 Salzman asserted no privacy interest in it. We've had  
22 that open discussion multiple times before your Honor.  
23 This should be something that we need to resolve  
24 tonight because otherwise --

25 THE COURT: We're not going to do it.



1 MS. PENZA: Your Honor, otherwise, we need  
2 to claw back things from the other defendants. There's  
3 a real problem here because we've been operating  
4 under --

5 MR. SOLOWAY: We'll resolve it tonight,  
6 Judge. That's no problem. We'll go back and look and  
7 we'll resolve it.

8 THE COURT: And you'll let me know tomorrow  
9 if you haven't worked this out?

10 MR. SOLOWAY: Yes.

11 MS. PENZA: And that will change the  
12 government's position on the deadline for substantial  
13 production because this was on the understanding that a  
14 whole home full of devices was provided to all  
15 defendants.

16 THE COURT: So you're meeting the district  
17 judge on the 4<sup>th</sup>? Are there other issues, other  
18 priorities?

19 MR. SOLOWAY: I think the only thing we'd  
20 want to suggest on the priorities is that -- I open  
21 this up for other comment -- that we hold to the  
22 December 7<sup>th</sup> deadline that the government volunteered in  
23 their letter for discovery. If things are later  
24 produced, there can be a discussion with the Court  
25 about whether they're admissible or not, if they

1 weren't produced for good cause, and have that  
2 discussion then. I think having everybody walking out  
3 of this room with a firm deadline of the substantial  
4 discovery date I think would be helpful.

5 THE COURT: All right.

6 MR. AGNIFILO: Let me just add one thing  
7 because I said emails but I didn't say text messages  
8 that are also in the government's possession at this  
9 point. That's a priority as well, Judge.

10 THE COURT: Okay.

11 MS. NECHELES: Your Honor, just in terms of  
12 priorities, there are a lot of business records that  
13 we're still surprised not to have seen. We would  
14 expect to have all -- those touch directly on issues in  
15 the case, telephone records, bank records, accounting  
16 records.

17 THE COURT: Non-device discovery.

18 MS. NECHELES: Right, subpoenas. All of  
19 that stuff should be -- I see that in the government --  
20 they have declined to sort of identify this stuff and  
21 say that they will turn it over by December 7<sup>th</sup>. That's  
22 a priority. That stuff is critical to our defense,  
23 much more critical for Ms. Bronfman than many other  
24 things. It should be easy for them to just copy it all  
25 and produce it.

1 THE COURT: Okay.

2 MS. PENZA: Your Honor, just on that point,  
3 we understand that. We have been doing that on a  
4 rolling basis. For example, Ms. Necheles I think  
5 emphasized that bank records were a priority. We've  
6 produced over 10,000 pages of bank records this week.  
7 We intend to produce more, so we understand that.

8 THE COURT: When are you going to finish  
9 that?

10 MS. PENZA: We're still receiving some.

11 THE COURT: I get that. Let's talk about  
12 what you have. I'm not expecting you to pull it all --

13 MS. PENZA: A couple weeks, your Honor, a  
14 few weeks.

15 THE COURT: I'm not sure that's reasonable.  
16 You have to tell me more. This is what we're going to  
17 do.

18 MS. PENZA: I will explain to you that there  
19 is a technical problem because certain banks have  
20 produced records in a way that are double-encrypted.  
21 In order to actually produce them to defense counsel,  
22 we have to go through a conversion process, so that's  
23 why I'm saying a couple weeks. It is a technical  
24 issue. Otherwise, we would have produced every single  
25 bank record in our possession as of last week, when we

1 produced these.

2 MS. NECHELES: It's not just bank records.

3 MS. PENZA: I understand. I was just giving  
4 an example.

5 THE COURT: All right, time out on this.  
6 You have issues. You need to talk about them. Number  
7 one, the Salzman devices, and two, your schedule. If  
8 you want to try to explain in more detail why this  
9 double encryption can't be worked out, have a  
10 conversation with the banks to produce it or what is  
11 going on, you can do that.

12 If you work these issues -- this is where  
13 we're leaving today: For now, the discovery is -- it's  
14 not a cutoff but the expectation is that the government  
15 will have produced as much as possible. If you don't  
16 have enough resources dedicated to this, then the  
17 office needs to have that conversation. This is not  
18 prejudging it. It is accepting that you can make these  
19 arguments but if you are not putting this into it and  
20 that's why this doesn't get done, then the government  
21 will have a problem.

22 If you have not figured out these issues  
23 with Salzman and a schedule for the production of the  
24 business records and similar materials, then come back  
25 here on Tuesday at 5:00. I'm on criminal duty so I

1 can't promise you that I will start at 5:00.  
2 Hopefully, it will and we will hash the rest of this  
3 out. It may be that there are issues you would like to  
4 talk about with each other ahead of your October 4<sup>th</sup>  
5 conference but you can do that.

6 Does anybody have a problem coming in?  
7 Calling in is not ideal. Hopefully, we can sort out --  
8 we'll try to figure that out or we'll do a version of  
9 what we did today.

10 MS. PENZA: Your Honor, may I just clarify  
11 something? Are we to come in on Tuesday if these  
12 issues are not resolved? In other words, are we  
13 setting -- are we planning to come in or are we --

14 THE COURT: You'll resolve your outstanding  
15 issues and that would mean that you are all working  
16 towards the December 7<sup>th</sup> deadline and the privilege  
17 schedule is acceptable, the privilege briefing schedule  
18 is acceptable. The other issues you can raise with the  
19 district judge. And you've worked out a schedule on  
20 these issues that were flagged today, which is the  
21 Salzman production and the -- I'm just going to group  
22 together those business records but the non-device  
23 discovery, then you can let me know by noon on Tuesday  
24 and I will expect you. If everyone is not on the same  
25 page about that, then there's a 5:00 conference.

1 MS. NECHELES: Your Honor, with respect to  
2 one thing.

3 THE COURT: Yes.

4 MS. NECHELES: I've never created a  
5 privilege log when the government has done a seizure.  
6 It's kind of an unusual process they're sort of setting  
7 up. They have a (ui) --

8 THE COURT: I'm going to interrupt you and  
9 say, why don't you all talk about it? If you don't  
10 work it out, we'll talk about it on Tuesday. Not to  
11 agree or disagree with you, but it seems like it would  
12 be a better idea, especially for Ms. Salzman, to have  
13 an idea of where you are with the production and then  
14 talk about what the process -- the point I think you're  
15 going with, which is what is your experience. And the  
16 second point being, however you resolve this issue, is  
17 it practical to do what's talked about here or should  
18 something else happen.

19 For now, 5:00 on Tuesday. If you need to  
20 call in, just let -- I guess the best thing would be if  
21 you could just have a joint letter about who we should  
22 call. We should try to get everybody on the line and  
23 not have this problem. Normally, I would suggest that  
24 you call in but that wasted twenty minutes here, so try  
25 to avoid that. If you have resolved everything, let me

1 know by noon. If somebody doesn't mind giving us a  
2 call, I don't see all the bounces right away,  
3 especially when I'm on criminal duty. We'll talk next  
4 week if needs be. Thank you.

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18 I certify that the foregoing is a correct  
19 transcript from the electronic sound recording of the  
20 proceedings in the above-entitled matter.  
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25 ELIZABETH BARRON

October 1, 2018